

STATE OF MICHIGAN
COURT OF APPEALS

GUY ROBINSON¹ and MARIAN
NOWOSATKO,

UNPUBLISHED
December 20, 2002

Plaintiffs,

and

MIKE NOWOSATKO,

Plaintiff-Appellant,

v

No. 225815
Oakland Circuit Court
LC No. 99-013241-CZ

BUSINESS FUNDING CORPORATION,

Defendant-Appellee.

GUY ROBINSON and MIKE NOWOSATKO,

Plaintiffs,

and

MARIAN NOWOSATKO,

Plaintiff-Appellant,

v

No. 226647
Oakland Circuit Court
LC No. 99-013241-CZ

BUSINESS FUNDING CORPORATION,

Defendant-Appellee.

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

¹ In No. 225815, Guy Robinson was dismissed by stipulation and order of this Court on 10/4/2000. In No. 226647, Guy Robinson was not a party to the appeal.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

Plaintiff Mike Nowosatko appeals by delayed leave granted in Docket No. 225815, and his wife, plaintiff Marian Nowosatko, appeals as of right in Docket No. 226647, challenging the trial court's order granting summary disposition to defendant Business Funding Corporation. We affirm.

Mike Nowosatko was the sole shareholder of Wellington Imperial Limousine, Ltd., d/b/a Fortune Graphics, and plaintiff Guy Robinson was a former stockholder of Advertising Dimensions, Inc., a Michigan corporation. They personally guaranteed the obligations of their companies. In 1990, the companies began factoring invoices with defendant. Plaintiffs alleged that their companies began to experience financial problems in late 1990 and 1991, whereupon they began preparing phony invoices which were then sold to defendant. In 1992, plaintiffs executed an "Agreement for Redemption of Fraud" after defaults between the parties. The parties subsequently executed a new settlement agreement in December 1993, whereby plaintiffs agreed to repay defendant \$145,000. Plaintiffs made monthly payments under that agreement until January 1999, and then commenced this action in March 1999, challenging the agreements based on usury, unconscionability, and duress, and challenging the validity of a mortgage on the Nowosatko home that was executed in August 1991.

The trial court granted defendant's motion for summary disposition, ruling that any usury defense would not apply to the transactions at issue because they did not involve loans, and that the defenses of duress and unconscionability did not apply because the settlement agreements were executed after significant negotiations with the assistance of counsel. Additionally, the court determined that, under the unclean hands doctrine, Mike was estopped from challenging the validity of the mortgage on the Nowosatko home on the basis that he allegedly forged Marian's signature. The court also determined that laches barred Marian from challenging the validity of the mortgage.

We conclude that this case is governed by the "clean hands" doctrine that was recently discussed in *Rose v National Auction Group*, 466 Mich 453; 646 NW2d 455 (2002). In *Rose*, the plaintiffs, George and Francis Rose, owned an island in Lake Huron that they decided to sell. George approached the defendant about selling the island at an auction. A representative of the defendant proposed the use of a "shill" or false bidder to make a phony bid, to which George agreed. During the auction, the high bid was \$175,000, far below the \$850,000 that the Roses wanted. The shill failed to enter the bidding, which closed at \$175,000. George signed a purchase agreement for \$175,000, and then brought an action to put the plaintiffs where they allegedly would have been had the shill performed. They argued that they would have cancelled the auction but for the lure of the shill bidder scheme. *Id.* at 456-461.

Our Supreme Court held that the plaintiffs' claims of fraud and misrepresentation were "barred by the bedrock principle that the preservation of the judicial system means no court acting in equity can allow its conscience to be moved to give such a plaintiff relief." *Id.* at 462. The Court noted that "the maxim that one 'who comes into equity must come with clean hands' is 'the expression of one of the elementary and fundamental conceptions of equity jurisprudence.'" *Id.* (citation omitted). Citing earlier decisions, the Court went on to describe the purpose of the clean hands doctrine as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief *however improper may have been the behavior of the defendant.*" *Id.* at 463

(emphasis in the original; citation omitted). The Court added that “even underhanded conduct that does not rise to the level of being legally prohibited can nevertheless require the application of the clean hands doctrine[.]” *Id.* at 466.

With regard to Docket No. 225815, Mike agreed that his company had been submitting phony invoices to defendant, and claimed that he forged his wife’s signature on a mortgage to entice defendant to purchase more invoices. Pursuant to *Rose, supra*, we conclude that the doors of equity are closed to him.

In Docket No. 226647, Marian claims that the mortgage on her home with her husband Mike, because it was allegedly forged, was therefore void and unenforceable, and that laches does not bar her claim. We disagree.

A trial court’s application of laches is reviewed for clear error. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). Laches is an equitable affirmative defense primarily based on circumstances that render inequitable the granting of relief to a dilatory plaintiff. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). It is caused by the plaintiff’s “failure to do something that should have been done under the circumstances or the failure to claim or enforce a right at the proper time.” *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990). Laches applies when there has been “an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice” *Dep’t of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). The defendant bears the burden of proving a lack of due diligence on the part of the plaintiff and resultant prejudice. *Gallagher, supra*. “[E]ach case must be determined on its own particular facts.” *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (2000).

In this case, the mortgage was signed in 1991. Marian knew of the alleged forgery as early as 1996, but remained silent until 1999. In reliance on that mortgage, defendant continued to purchase invoices from Mike and Robinson, and refrained from pursuing available collection remedies for more than six years. Marian did not offer an explanation or excuse for her delay of three years before enforcing the claim. Given all the facts of this case, the trial court did not clearly err in finding that laches applied. *Gallagher, supra*; *City of Troy, supra*.

Affirmed.

/s/ Peter D. O’Connell
/s/ Barbara B. MacKenzie